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National Wildlife Federation v. Hanson: Content-based Review of Corps Wetlands Determinations under the Citizens' Suit Provision of the Clean Water Act

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NOTES

National Wildlife Federation v. Hanson: Content-based Review of Corps Wetlands Determinations Under the Citizens' Suit Provision of the Clean Water Act

Real estate development and environmental protection collide when land users seek to develop wetlands.[1] Where developers plan to put advantageously located wetlands tracts to commercial use, environmentalists seek to protect those tracts and to preserve their environmental integrity. Section 404[2] of the Clean Water Act (CWA)[3] of 1972 struck a compromise between the two factions, protecting the wetlands by requiring wetlands developers to obtain regulatory "dredge and fill" permits from the United States Army Corps of Engineers before development.[4] The Corps has the primary responsibility for determining whether particular tracts are wetlands, and thus whether they are subject to the permit program.[5]

This system, in which agency decisions are dispositive in matters important to opposing factions, breeds challenges of those decisions. If the Corps determines that a tract is a wetland, the developers object; otherwise, if it determines that a tract is not a wetland, the environmentalists object. There are two statutory bases on which citizens might be able to seek judicial review of wetlands determinations: the citizens' suit provision of the CWA,[6] and the more general

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1. "Wetlands" are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 328.3(b) (1987).

2. 33 U.S.C. § 1344 (1982 & Supp. 1986).

3. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982 & Supp. 1986)) (formally titled the Federal Water Pollution Control Act, but commonly referred to as the Clean Water Act).

4. 33 U.S.C. § 1344(a) (1982). Wetlands merit protection because:

> wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.
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> The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve.

National Wildlife Fed'n v. Hanson, 623 F. Supp. 1539, 1543-44 (E.D.N.C. 1985) (quoting 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4336), *aff'd in part, vacated in part*, 859 F.2d 313 (4th Cir. 1988). See *infra* notes 40-48 and accompanying text for a full discussion of the § 404 program.

5. 33 U.S.C. § 1344(a)-(c) (1982 and Supp. 1986). If a tract is a "wetland" then it is subject to the provisions of the CWA, including § 404. 33 C.F.R. § 328 (1987). The Corps has the primary duty to make wetlands determinations, enlisting the aid of the EPA in "special cases." Jurisdiction of Dredged and Fill Program; Memorandum of Understanding, 45 Fed. Reg. 45018 (1980) [hereinafter MOU]. See *infra* notes 43-48 and accompanying text for a discussion of this process and of "special cases."

6. 33 U.S.C. § 1365(a) (1982). This provision explicitly authorizes citizens' suits:

> [A]ny citizen may commence a civil action on his own behalf—
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> (1) against any person (including (i) the United States, and (ii) any other governmen-

provisions of the Administrative Procedure Act (APA).[7] An important distinction between the two is that costs and attorneys' fees are more readily available under the CWA.[8] Consequently, the CWA approach is more attractive to potential litigants.

In *National Wildlife Federation v. Hanson*[9] the United States Court of Appeals for the Fourth Circuit concluded that review of a wetlands determination is a proper CWA citizens' suit[10] and that, accordingly, CWA costs and attorneys' fees are available to the prevailing party.[11] This Note addresses the propriety of such review and of awarding the attorneys' fees made available under the Act. It begins by describing *Hanson* and reviewing the statutory framework of the CWA, its "dredge and fill" program, the Act's citizens' suit provision, and the APA. Noting the dearth of case law in citizens' challenges of Corps wetlands determinations, the Note proceeds to review the case law in a related area: the performance and judicial review of CWA duties by the United States Environmental Protection Agency (EPA). Finally, using the EPA cases as a reference, the Note discusses what sort of judicial review is appropriate for Corps wetlands determinations. The Note concludes that the proper vehicle for judicial review of these determinations is the APA rather than the CWA, and that, consequently, CWA attorneys' fees should not be available to prevailing plaintiffs.[12]

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tal instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Chapter which is not discretionary with the Administrator.

Id. Since this Note addresses only challenges of Corps wetlands determinations, only § 1365(a)(2) is relevant.

7. 5 U.S.C. §§ 701-706 (1982 & Supp. 1986). The APA provides a right to judicial review for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Id.* at § 702.

The APA itself does not provide subject-matter jurisdiction for review. Califano v. Sanders, 430 U.S. 99, 107 (1977) ("[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action."). Instead, it provides a standard for review under other statutes. Courts frequently suggest in the environmental context that the APA and 33 U.S.C. § 1331, the federal-question statute, together provide a court with subject-matter jurisdiction over EPA and Corps decisions. *See, e.g.*, Golden Gate Audubon Soc'y v. United States Army Corps of Engineers, 28 Env't. Rep. Cas. (BNA) 1005, 1006 (N.D. Cal. June 20, 1988) (opinion recognizing amended order); City of Las Vegas v. Clark County, 755 F.2d 697, 704 (9th Cir. 1985); Hough v. Marsh, 557 F. Supp. 74, 78 (D. Mass. 1982).

8. Section 505(d) of the CWA provides for awards of costs and attorneys' fees. It provides, "[t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d) (1982).

The APA does not provide for awards of costs and fees. Such provision is made, however, in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1982 & Supp. 1986), and this act may be used in conjunction with the APA. See *infra* notes 55-56 and accompanying text for a discussion of the practical availability of fees under this provision.

9. 859 F.2d 313 (4th Cir. 1988).

10. *Id.* at 316.

11. *Id.*

12. Unlike in England, where attorneys' fees are routinely awarded to the prevailing party by statute, "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable

The facts in *Hanson* are typical of the developer-environmentalist conflicts in most wetlands cases. Generally a developer seeks to put its land to profitable use, and environmentalists step in to prevent ecological destruction. The EPA and the Corps wind up caught in the middle, left to determine the fate of the land by permitting development or by prescribing regulations.

In *Hanson*, defendant First Colony Farms (FCF) owned a tract of land in eastern North Carolina.[13] The coastal tract of about 30,000 acres was bordered by the Albemarle Sound, the Pamlico Sound, and the Alligator River, and was historically considered a forested swamp, useful only for timber production.[14] In the early 1970s, FCF and defendant Peat Methanol Associates wished to mine peat from a fifteen-thousand acre site on the tract and to process that peat in a peat-to-methanol fuel plant located on the tract.[15] The process would require substantial drainage of the tract.[16]

In the period from 1974 to 1978 the Corps consulted with FCF about the probable necessity of a permit for the mining operation because the Corps believed the tract was probably a wetland.[17] In 1979 FCF formally asked the Corps to make a wetlands determination regarding the tract.[18] The Corps, after various inspections of the site's vegetation and ground water characteristics,[19] concluded that the tract was not a wetland and that, consequently, no dredge and fill permit would be required.[20]

Shortly thereafter, eight environmental groups challenged the Corps' determination under the citizens' suit provision of the CWA.[21] The district court, citing the Corps' failures to gather proper inundation history records, to analyze

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attorneys' fee from the loser." Alyeska Pipeline Serv. v. Wilderness Soc'y., 421 U.S. 240, 247 (1975); *see, e.g.*, Summit Valley Indus. v. Local 112, United Bd. of Carpenters, 456 U.S. 717, 721 (1982) (quoting Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967)) ("attorney's fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' ").

13. National Wildlife Fed'n v. Hanson, 623 F. Supp. 1539, 1540 (E.D.N.C. 1985), *aff'd in part, vacated in part*, 859 F.2d 313 (4th Cir. 1988).

14. *Id.*

15. *Id.* at 1541.

> Peat is a light-brown to black spongy mass of more or less decomposed plant debris in a waterlogged environment. The upper layers are fibrous and often contain still recognizable woody material sometimes consisting of the stumps and roots of what were once large trees. . . . All peat deposits have extremely high water contents exceeding 90 per cent of their total weight prior to drainage.

COAL MINING GEOLOGY 105 (I. Williamson ed. 1967). In the mining process the peat tract is drained, then the peat is harvested, shaped, and air-dried in preparation for its use in a peat-to-methanol plant. *Hanson*, 623 F. Supp. at 1541.

16. *Id.*

17. *Id.*

18. *Id.*

19. A tract is a wetland if it is "inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation. This inundation or saturation may be caused by either surface water, ground water, or a combination of both." 42 Fed. Reg. 37,112, 37,128 (1977). Thus, in a wetlands determination, the Corps must evaluate vegetation, hydrology, and soils. *Hanson*, 623 F. Supp. at 1545; *see also* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 906 (5th Cir. 1983) ("The determination itself which requires an analysis of the types of vegetation, soil and water conditions is the kind of scientific decision normally accorded significant deference by the courts.").

20. *Hanson*, 623 F. Supp. at 1541-42.

21. *Id.* at 1542. See *supra* note 6 for the text of the citizens' suit provision.

soil, and to evaluate vegetation meaningfully,[22] found "no scientific basis in the record"[23] for the determination and set it aside as arbitrary and capricious.[24] Plaintiffs later petitioned the court for an award of costs and attorneys' fees under section 505(d) of the CWA.[25] The Corps argued that the suit was not properly founded on the citizens' suit provision because the Corps had not failed to perform any nondiscretionary duty.[26] This argument was based on section 505(a)(2) of the CWA, which makes the Administrator's failure to perform a nondiscretionary duty a prerequisite to a citizens' suit.[27] The court rejected this argument,[28] and awarded over $400,000 in costs and fees to the plaintiffs.[29]

On appeal by the Corps, the United States Court of Appeals for the Fourth Circuit affirmed the award of costs and fees.[30] In an opinion by Judge Butzner,[31] the court ratified the district court's conclusion that the citizens' suit provision of the CWA conferred subject-matter jurisdiction on the court to hear citizens' challenges of Corps wetlands determinations.[32] The court, like the trial court, rejected the Corps' argument that the suit challenged the Corps' exercise of discretion with respect to wetlands rather than the EPA administrator's failure to perform a mandatory duty.[33]

A number of statutes, beginning with the CWA, figure into this subject-matter jurisdiction analysis. Congress enacted the Clean Water Act Amendments of 1972[34] in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[35] The Act applies to the nation's "navigable waters,"[36] defined as "the waters of the United States,"[37] specifically

22. *Hanson* 623 F. Supp. at 1547.

23. *Id.*

24. *Id.* at 1548. The "arbitrary and capricious" standard comes from the APA. 5 U.S.C. § 706(2)(A) (1976). This standard mandates that an agency act is to be set aside if found to be "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law." *Id.* This standard was presumably used by the court because the CWA does not provide a precise standard for judicial review. *See Hanson*, 623 F. Supp. at 1545.

25. National Wildlife Fed'n v. Hanson, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20008, 20008 (E.D.N.C. Oct. 1, 1987) (fee award order).

26. *Id.* at 20009.

27. 33 U.S.C. § 1365(a)(2) (1982); see *supra* note 6 for the text of this provision.

28. *Hanson*, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 20008 (Oct. 1 1987); *see infra* notes 99-124 and accompanying text.

29. *Hanson*, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 20011.

30. *Hanson*, 859 F.2d at 315. The court affirmed the award of costs and fees, but remanded the case for recalculation of the fees because the trial court had used contemporary rather than historic rates. *Id.*

31. Judge Chapman and Judge Wilkins completed the panel. *Id.* at 314.

32. *Id.* at 315-16.

33. *Id.* The court also rejected the federal defendants' argument that CWA attorneys' fees were not appropriate merely because the trial court had applied the APA standards, noting that "review . . . under APA standards . . . did not alter the jurisdictional base of the court's judgment." *Id.* at 316.

34. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)).

35. 33 U.S.C. § 1251(a) (1982); *see also* Save the Bay, Inc. v. Administrator of EPA, 556 F.2d 1282, 1284 (5th Cir. 1977) ("The 1972 amendments to the Federal Water Pollution Control Act joined the Environmental Protection Agency and the fifty states in a delicate partnership charged with controlling and eventually eliminating water pollution throughout the United States.").

36. 33 U.S.C. § 1344(a) (1982).

including "wetlands."[38] To achieve its stated goal, Congress broadly legislated in section 301 of the CWA that "the discharge of any pollutant [into navigable waters] by any person shall be unlawful."[39]

Section 404 of the CWA, an express exception to the blanket prohibition of section 301, establishes a permit program, administered by the Corps, for "dredge and fill" operations.[40] No party may deposit dredged or fill material in a wetland without first obtaining a regulatory permit from the Corps.[41] A permit is required for activities on specific tracts determined to be wetlands.[42]

The Corps and the EPA share responsibility for making wetlands determinations.[43] The Corps, with its more capable field resources,[44] has the primary responsibility for making determinations.[45] If it finds that a particular tract of land is a "special case,"[46] the Corps must notify the EPA, which then makes a final determination.[47] Otherwise, the EPA accepts the Corps' determination as final.[48]

Section 505, one of the possible statutory bases for challenging wetlands determinations, is the "citizens' suit" provision of the CWA.[49] It provides in

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37. 33 U.S.C. § 1362(7) (1982).

38. 33 C.F.R. § 328.1 & .3(a) (1987) (Act applies to only those wetlands within definition of navigable waters). See *supra* note 1 for a definition of "wetlands."

39. 33 U.S.C. § 1311(a) (1982).

40. "Dredged material means material that is excavated or dredged from navigable waters . . . [but] does not include material resulting from normal farming, silvaculture, and ranching activities." 33 C.F.R. § 209.120(d)(4) (1976). "Fill material," under the regulation, "means any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body . . . [but] does not inlcude . . . [m]aterial resulting from normal farming . . . [or] [m]aterial placed for the purpose of maintenance" or emergency repair of existing fills "such as dikes, dams, levees, . . . causeways, and bridge abutments or approaches." *Id.* at § 209.120(d)(6).

41. Under the § 404 program, "[t]he Secretary [of the Army, acting through the Corps of Engineers] may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (1982). Guidelines prepared by the Corps and the EPA are used in specifying disposal sites. *Id.* at § 1344(b)(1) (Supp. IV 1987). Section 404(c) gives the Administrator veto power "whenever he determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." *Id.* at § 1344(c) (1982). See Caplin, *Is Congress Protecting Our Water? The Controversy Over Section 404, Federal Water Pollution Control Amendments of 1972*, 31 U. MIAMI L. REV. 445, 449-54 (1977) for a thorough background discussion of the program.

42. "Interstate wetlands" are included in the Nation's "navigable waters." 33 C.F.R. § 328.1 & .3(a) (1987). A tract is a wetland, it is subject to the § 404 permit program. *See also* National Wildlife Fed'n v. Hanson, 623 F. Supp. 1539, 1544 (E.D.N.C. 1985) ("if [a tract] is considered to be "wetlands," as defined in 33 C.F.R. § 323.2(c), a § 404 permit is required to proceed with . . . development plans.").

43. *See* MOU, *supra* note 5, at 45018.

44. MOU, *supra* note 5, at 45018.

45. MOU, *supra* note 5, at 45018.

46. "Special cases are those situations where significant issues or technical difficulties exist concerning the jurisdictional scope of Section 404 waters, the environmental consequences of jurisdiction are significant, and EPA has declared a special interest." MOU, *supra* note 5, at 45019.

47. MOU, *supra* note 5, at 45018.

48. MOU, *supra* note 5, at 45018.

49. 33 U.S.C. § 1365(a)(2) (1982). The citizens' suit provision is designed "to supplement and expedite administrative action to abate violations of the Act. . . . Recourse to the courts is appropriate only when the administrative action taken is less than adequate." Massachusetts v. United States

part that citizens may bring suit "against the Administrator [of the EPA] where there is alleged a failure to perform any act or duty under [the CWA] which is not discretionary with the Administrator."[50] Section 505(d) makes costs and attorneys' fees available to prevailing plaintiffs in citizens' suits.[51]

The other possible statutory basis for citizens' challenges of wetlands determinations is the Administrative Procedure Act.[52] It provides aggrieved parties a right to judicial review of agency acts.[53] Under the APA, a court will strike down any agency act found to be "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law."[54] The Equal Access to Justice Act, commonly used in conjunction with the APA, makes fee awards available to prevailing parties in proceedings for judicial review of agency action unless the position of the United States in the proceedings is "substantially justified."[55]

Veterans Admin., 541 F.2d 119, 121 (1st Cir. 1976) (citizen plaintiffs alleging violation of CWA discharge permit by VA hospital).

50. 33 U.S.C. § 1365(a)(2) (1982). Such provisions are quite common in environmental statutes. For a list of citizens' suit provisions in other environmental statutes, see Comment, *Citizen Suits Under the Clean Water Act: Waiting for Godot in the Fifth Circuit*, 62 TUL. L. REV. 175, 176 nn.7-8 (1987).

Section 505 was modeled after the citizens' suit provision of the Clean Air Act, 42 U.S.C. § 7604 (1982). *See* Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 108 S. Ct. 376, 383 (1987) ("both the Senate and House Reports explicitly connected [the CWA citizens' suit provision] to the citizen suit provisions authorized by the Clean Air Act" (citing S. REP. NO. 414, 92nd Cong., 1st Sess. at 79 (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3744 ("modeled on the provision enacted in the Clean Air Amendments . . .") and H.R. REP. NO. 911, 92nd Cong., 1st Sess. 133 (1972) ("closely follows . . . the Clean Air Act"))); Roosevelt Campobello Int'l Park Comm'n v. EPA, 711 F.2d 431, 434 (1st Cir. 1983) (discussing Clean Air Act citizens' suit provision "on which the Clean Water Act sections . . . were modeled").

The parallel wording of the provisions makes cases interpreting the Clean Air Act quite persuasive:

> [T]he common concern of both statutes with pollution, and the common purpose of each act's authorization of attorneys' fees to promote citizen enforcement [persuades us] that Congress specifically intended the two provisions on attorneys' fees to have the same scope and to be interpreted in the same way.

Roosevelt, 711 F.2d at 437.

51. 33 U.S.C.A. § 1365(d) (Supp. 1988). This section of the CWA provides: "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." *Id.*

52. 5 U.S.C. §§ 701-706 (1982 & Supp. 1986).

53. 5 U.S.C. § 702 (Supp. 1986).

54. 5 U.S.C. § 706(2)(a) (1982). Section 706 reads, in part:

> The reviewing court shall—
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required bylaw;
> (E) unsupported by substantial evidence . . . ; or
> (F) unwarranted by the facts . . . .

Id.

55. 28 U.S.C. § 2412(d)(1)(A) (Supp. 1986). This section provides:

> [A] court shall award to a prevailing party other than the United States fees and other

The government's position is "substantially justified" if it is reasonable in fact and in law.[56]

An analysis of whether the citizens' suit provision of the CWA grants subject-matter jurisdiction for challenges of Corps wetlands determinations requires consideration of two issues: (1) whether the right to sue the Administrator implicitly includes a right to sue the Corps in its derivative role, and, if so, (2) whether the Corps has a nondiscretionary duty in identifying wetlands subject to the dredge and fill permit program. If the Corps may be sued and has a nondiscretionary duty, then the section grants subject-matter jurisdiction.

Resolution of the first issue,[57] whether the right to sue the Administrator implicitly includes a right to sue the Corps, is significant because on its face the statute applies only to the Administrator of the EPA and not to the Corps.[58] Thus, unless the provision implicitly includes the Corps, it plainly does not confer subject-matter jurisdiction on the courts to hear cases regarding the Corps' activities.

The argument against the right to sue the Corps is one of statutory construction, relying on Congress' omission of the Corps in the provision.[59] The contrary argument notes that the Corps acts as an agent of the EPA insofar as it performs wetlands determinations, and should thus be accessible under the provision's right to sue the EPA.[60] The plain language of the statute makes no

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expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Id.

56. Pullen v. Bowen, 820 F.2d 105, 107 (4th Cir. 1987). "The Act aims to penalize unreasonable behavior on the part of the government without impairing the vigor and flexibility of its litigating position." *Id.*; Dunn v. Heckler, 614 F. Supp. 45, 48 (E.D.N.C. 1985) (citing Guthrie v. Schweiker, 718 F.2d 104, 108 (4th Cir. 1983)) ("government's position . . . is substantially justified if the United States Attorney does no more than rely on an 'arguably defensible record.' "). Under this standard the government's position may be substantially justified even if the government loses, S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 672 F.2d 426, 430 (5th Cir. 1982) (citing H.R. REP. No. 1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4990), or if its decision to litigate was not based on a substantial probability of prevailing. *Id.* Further, an agency's being reversed does not raise a presumption that the agency's position was not substantially justified. *Pullen*, 820 F.2d at 108.

57. This section assumes that wetlands determinations are reviewable under the citizens' suit provision. This assumption will later be shown to be erroneous, but that conclusion does not affect the present discussion of a right of action against the Corps.

58. 33 U.S.C.A. § 1365(a)(2) (1986 & Supp. 1988). See *supra* note 6 for the text of this provision.

59. Under the statutory construction argument, two basic rules of construction support a literal reading of the statute. First, the section is in derogation of sovereign immunity and "[w]aivers of sovereign immunity must be strictly construed in favor of the sovereign . . . *and not enlarged beyond what the language requires.*" Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983) (emphasis added). Second, the plain language of § 505(a)(2) makes no mention of the Corps.

60. The derivative access argument concerns the relationship between the Corps and the EPA. The CWA does not clearly define the balance of authority between the two agencies. Many sources, however, hint or assume that the EPA has the ultimate authority for the enforcement of the act. *See, e.g.*, Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 15 (1979) (despite the Corps' administration of the dredge and fill permit program, "[t]he Administrator [of EPA] . . . retained substantial responsibility over [its] administration and enforcement"); MOU, *supra* note 5, at 45018 (corps must enlist assistance of EPA in "special cases"

mention of the Corps, yet to prohibit suits against the Corps is to make the availability of review of wetlands determinations dependent on which agency makes them. That is, if the EPA makes or assists in a determination, review would be available, but if the Corps makes a determination on its own, as is typically the case, no review would be available. The three courts that have addressed this question have summarily decided that Congress could not have intended to provide a right to sue the EPA but not the Corps when the two agencies perform substantially the same task.[61]

Resolution of the second issue, whether the Corps has a nondiscretionary duty in identifying wetlands, focuses on section 505(a)(2) of the CWA. That section makes the Administrator's failure to perform a nondiscretionary duty a prerequisite to a citizens' suit.[62] In order for that section to apply to a Corps wetlands determination, the Corps must be shown to have failed to perform a nondiscretionary duty in its determination process. A nondiscretionary duty is a duty that is required by a provision of the CWA and is "mandatory in nature rather than directory."[63]

The *Hanson* court had little precedent on which to rely in drawing its discretionary duty conclusions, for very few challenges to Corps wetlands determinations have relied on the citizens' suit provision.[64] There have been, however, a number of citizens' suits against the EPA challenging that agency's performance of its various duties.[65] A review of these EPA cases helps define what types of duties are nondiscretionary, which are discretionary, and what challenges are

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where jurisdictional determinations will be difficult); 33 U.S.C. § 1344(c) (1982) (administrator has partial veto power over issuance of permits).

The derivative access argument is basically that the Corps is the agent of the EPA in making wetlands determinations and that Congress must have implicitly intended to provide a right to sue agents of the EPA, namely the Corps, in § 505(b)(2). Otherwise, the argument proceeds, judicial review would be available of EPA determinations but not of Corps determinations.

61. *Hanson*, 859 F.2d at 316. "Congress cannot have intended to allow citizens to challenge erroneous wetlands determinations when the EPA Administrator makes them but to prohibit such challenges when the Corps makes the determination and the EPA fails to exert its authority over the Corps' determination." *Id.*; *Hanson*, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 20009 (trial court: holding Corps and EPA jointly responsible and answerable under § 1365(a)(2)); Golden Gate Audubon Soc'y v. United States Army Corps of Engineers, 700 F. Supp. 1549, 1553 (N.D. Cal. 1988). "It is wholly illogical to assume that Congress intended to allow citizens to challenge erroneous wetlands determinations when the EPA makes them, but prohibit such challenges when the Corps makes the determination and the EPA fails to exert its final authority over the Corps' determination." *Hanson*, 859 F.2d at 316.

For the purposes of this Note, I will assume that Congress did indeed intend to grant a right to sue the Corps in § 505(b)(2), and I will focus on the later nondiscretionary task issue. *See infra* notes 62-124 and accompanying text. Notice, however, that the derivative access argument fails if the Corps is not subordinate to the EPA in wetlands determinations, and that this issue has not yet been fully resolved.

62. 33 U.S.C. § 1365(a)(2) (1982).

63. Committee for Consideration of Jones Falls Sewage System v. Train, 387 F. Supp. 526, 529 (D. Md. 1975). The duty must be to perform a "specific, plain, ministerial act, 'devoid of the exercise of discretion.' . . . An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt." J.E. Brenneman Co. v. Schramm, 473 F. Supp. 1316, 1318-19 (E.D. Pa. 1979) (citations omitted).

64. *See, e.g.*, National Wildlife Fed'n v. Hanson, 623 F. Supp. 1539 (E.D.N.C. 1985), *aff'd in part, vacated in part*, 859 F.2d 313 (4th Cir. 1988); Golden Gate Audubon Soc'y v. United States Army Corps of Engineers, Env't Rep. Cas. (BNA) 1005 (N.D. Cal. June 20, 1988).

65. *See infra* notes 66-93 and accompanying text.

not duty-based at all, but involve instead the content of various determinations. These distinctions are necessary in determining, as the *Hanson* court did, whether the Corps fails to perform a nondiscretionary duty when it makes an erroneous wetlands determination.

Suits against the EPA under section 505(a)(2) fall into three general categories: (a) actions to force the EPA to promulgate pollution standards or limitations;[66] (b) suits to require the EPA to enforce the provisions of the CWA against a particular polluter;[67] and (c) content-based challenges of particular EPA regulations.[68] Each class will be examined and then analogies will be drawn between the treatments of the categories and the treatment of challenges of Corps' wetlands determinations.

A number of cases have been brought under the citizens' suit provision to force the EPA to promulgate various standards for pollution control under the CWA.[69] These cases uniformly hold that EPA's duty to promulgate standards when required to do so by the CWA is nondiscretionary and is thus a proper foundation for a section 505(a)(2) suit.[70] Similarly, a court held that EPA's duty to issue an environmental impact statement, if one is required by the National Environmental Policy Act,[71] would be nondiscretionary.[72]

In the second category of cases, many circuits have been forced to decide whether the EPA has discretion to enforce the CWA against a specific polluter once a violation has been brought to its attention. The EPA enforcement section, section 309(a)(3), reads in part:

> Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of . . . section 1311 [regarding permits for overflows] . . . [he] shall issue an order requiring such person to comply with such section . . . , or [he] shall bring a civil action in accordance with subsection (b) of this section.[73]

Although the courts are split as to whether this section imposes a mandatory duty to enforce the provisions of the CWA on the EPA,[74] the major-

66. *See infra* notes 69-72 and accompanying text.

67. *See infra* notes 73-79 and accompanying text.

68. *See infra* notes 80-93 and accompanying text.

69. *See, e.g.*, Scott v. Hammond, 741 F.2d 992 (7th Cir. 1984); National Resources Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1974); Pennsylvania Dep't of Envtl. Resources v. EPA, 618 F.2d 991 (3d Cir. 1980).

70. *Scott*, 741 F.2d at 996; NRDC v. Train, 510 F.2d at 699-700; *Pennsylvania Dep't of Envtl. Resources*, 618 F.2d at 994-95.

71. 42 U.S.C. §§ 4321-4370 (1982).

72. Chesapeake Bay Found., Inc. v. United States, 445 F. Supp. 1349, 1355 (E.D. Va. 1978). This is an interesting result, since § 505(a)(2) contemplates only failures to perform nondiscretionary tasks under the CWA. The *Chesapeake Bay* court held that it would have mandamus jurisdiction under § 1365(a)(2) to determine whether the EPA was required under the National Environmental Policy Act to file an environmental impact statement. *Id.*

73. 33 U.S.C.A. § 1319(a)(1) (1986).

74. For cases holding that the duty to enforce is nondiscretionary, see, *e.g.*, South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp 118, 134 (D.S.C. 1978); Illinois *ex rel.* Scott v. Hoffman, 425 F. Supp. 71, 77 (S.D. Ill. 1977); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1183 (D. Ariz. 1975). For cases holding that the duty is discretionary, see, *e.g.*, Dubois v. Thomas, 820 F.2d 943, 945 (8th Cir. 1987); Sierra Club v. Train, 557 F.2d 485, 491 (5th Cir. 1977); State Water Control Bd. v. Train, 559 F.2d 921, 927 (4th Cir. 1977); Caldwell v. Gurley Refining Co., 533 F.

ity view appears to be that this duty is discretionary.[75] This view, which seems surprising because of the statute's mandatory language—"*shall* issue an order . . . or . . . *shall* bring a civil action,"[76] is in keeping with the Supreme Court's position on judicial review of agency enforcement decisions. The Court, in *Heckler v. Chaney*,[77] noted the "general unsuitability for judicial review of agency decisions to refuse enforcement."[78] Because the duty to enforce is discretionary with the Administrator, and because a nondiscretionary duty is a prerequisite to a citizens' suit, it follows that the duty to enforce is not a proper predicate for such a suit.[79]

Finally, citizen-plaintiffs have used the citizens' suit provision to raise content-based challenges against the EPA.[80] This category most closely parallels judicial review of wetlands determinations and is therefore the most instructive for the *Hanson* question. Here, as in review of wetlands determinations, a duty has already been performed and the judicial review concerns the quality of that performance. Plaintiffs typically challenge existing regulations prescribed by the EPA for particular polluters or for particular geographic areas. The courts hearing these cases have each held that the citizens' suit provision is not the appropriate avenue for content-based judicial review. Since content questions necessarily concern duties that have already been performed, the failure to perform a nondiscretionary duty requirement of the provision is not satisfied. In-

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Supp. 252, 257 (E.D. Ark. 1982); Committee for the Consideration of the Jones Falls Sewage System v. Train, 387 F. Supp. 526, 529-30 (D. Md. 1975). *See also* City of Seabrook v. Costle, 659 F.2d 1371, 1374 (5th Cir. 1981) (Clean Air Act case holding that enforcement duty under similar statute is discretionary).

75. *Dubois*, 820 F.2d at 946 (citing "the majority view that § 309 imposes only discretionary duties"). See *supra* text accompanying note 73 for text of § 309.

76. 33 U.S.C.A. § 1319(a)(1) (1986) (emphasis added). Courts making this decision typically perform a statutory construction analysis on this "shall" language, weighing the mandatory quality of the language against the policy impacts of requiring the EPA to pursue every incidence of pollution. *See, e.g., Dubois*, 820 F.2d at 946-50; *Sierra Club*, 557 F.2d at 488-91; *South Carolina Wildlife*, 457 F. Supp. at 129-33.

77. 470 U.S. 821 (1985).

78. *Id.* at 831. The Court continued:

> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Id. The Court also referred to the discretionary nature of this duty in Gwaltney of Smithfield v. Chesapeake Bay Foundation, 108 S. Ct. 376 (1987). In *Gwaltney* the Court held that section 505(a)(2) does not grant subject-matter jurisdiction for suits against polluters for wholly past violations of the CWA. *Id.* at 383. The Court stated: "If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forego, then *the Administrator's discretion to enforce the Act in the public interest* would be curtailed considerably." *Id.* (emphasis added).

79. The same reasoning holds for EPA decisions to exercise its emergency powers under the CWA. *See Committee for Consideration of Jones Falls Sewage System*, 387 F. Supp. at 529.

80. *See, e.g.*, City of Las Vegas v. Clark County, 755 F.2d 697 (9th Cir. 1984); Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984) (per curiam); Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982). See *infra* notes 82-93 and accompanying text for a discussion of these cases.

stead, the courts hold that the Administrative Procedure Act provides the only remedy.[81]

In *Scott v. City of Hammond*,[82] the United States Court of Appeals for the Seventh Circuit addressed a challenge to EPA-approved state standards that allegedly failed to protect the public health by not restricting certain dangerous pollutants.[83] The court concluded that the citizens' suit provision of section 505 did not authorize such content-based challenges.[84] The court stated the theme common to all content-based challenges:

> [T]he *content* of water quality standards cannot ordinarily be challenged through a citizen's suit. An administrator's duty to approve or promulgate some water quality standards might be "nondiscretionary" within the meaning of [section 505(a)(2)], but the *content* of the standards is certainly at least somewhat discretionary with the EPA. The only recognized avenue for challenge to the substance of EPA's actions taken with respect to state submissions is a suit for judicial review under the Administrative Procedure Act . . . .[85]

The United States Court of Appeals for the Ninth Circuit heard a similar challenge in *City of Las Vegas v. Clark County*.[86] This court agreed with the *Scott* court, noting that "[t]he City's real quarrel is with the content of the State water quality standard, which is not the proper subject of a suit under CWA section 505(a)(2)."[87] Both the *Scott* and the *Las Vegas* courts observed that the EPA has at least some discretion in establishing standards,[88] and both courts held that the proper basis for content-based review is the APA.[89]

Scott and *Las Vegas* stand for the proposition that while the EPA may sometimes be forced to promulgate standards under section 505, disgruntled citizens must look elsewhere for content-based judicial review of those standards. Specifically, they must look to the APA. A federal district court reached the same conclusion in *Hough v. Marsh*,[90] a suit brought by private citizens under the APA[91] to challenge the Corps' issuance of a dredge and fill permit. The court there noted that "[s]ection 505 by its express language is inapplicable to [this type of challenge] . . . . Plaintiffs are not seeking to . . . compel an agency official to perform a nondiscretionary duty. Quite to the contrary, they are alleging an abuse of discretion in the issuance of a permit."[92] The *Hough* court held that this challenge properly would be made under the APA.[93]

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81. *See infra* notes 82-93 and accompanying text.
82. 741 F.2d 992 (7th Cir. 1984) (per curiam).
83. *Id.* at 993-94.
84. *Id.* at 995.
85. *Id.* (footnote omitted).
86. 755 F.2d 697 (9th Cir. 1985).
87. *Id.* at 704.
88. *Las Vegas*, 755 F.2d at 704; *Scott*, 741 F.2d at 995.
89. *Las Vegas*, 755 F.2d at 704; *Scott*, 741 F.2d at 995.
90. 557 F. Supp. 74 (D. Mass. 1982).
91. This suit, unlike *Scott* and *Las Vegas*, was brought under the APA initially, rather than under the CWA. *Hough*, 557 F. Supp. at 77.
92. *Id.* at 78.
93. *Id.* at 79.

Other than the *Hanson* courts, only one court has specifically addressed the propriety of citizens' challenges of wetlands determinations under the citizens' suit provision. *Golden Gate Audubon Society, Inc. v. United States Army Department*[94] was a citizens' group's challenge of a Corps wetlands determination.[95] This court originally held that the citizens' suit provision granted subject-matter jurisdiction for wetlands determination challenges.[96] Upon motion of the defendants, however,[97] the court reversed itself in an amended order in which it deleted the section finding subject-matter jurisdiction under the citizens' suit section of the CWA and added a section establishing jurisdiction under the APA and the federal-question statute.[98]

The *Hanson* trial court resolved the nondiscretionary duty issue by holding that the Corps had failed to carry out its mandatory duty to make a "proper" wetlands determination.[99] The United States Court of Appeals for the Fourth Circuit affirmed this view, holding that "[t]he Corps has the nondiscretionary duty to regulate dredged or fill material, and to fulfill that duty it must make *reasoned* wetlands determinations."[100] Since the Corps had failed to perform a nondiscretionary duty, the courts reasoned, subject-matter jurisdiction was proper under the citizens' suit provision.

The *Hanson* courts' resolutions of the nondiscretionary duty requirement of section 505(b)(2) are suspect. The interjection of the word "proper" by the trial court and of "reasoned" by the appellate court have the effect of providing review, under the citizens' suit provision, of the content of Corps decisions.[101] In the general scheme of agency review, this is precisely the purpose of the APA.[102]

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94. Golden Gate Audubon Soc'y v. United States Army Corps of Engineers, 700 F. Supp. 1549 (N.D. Cal. 1988), *amended by* 28 Env't Rep. Cas. (BNA) 1007 (N.D. Cal. June 21, 1988).

95. *Id.* at 1551.

96. *Id.* at 1551-52.

97. *Golden Gate*, 28 Env't. Rep. Cas. (BNA) 1005 (N.D. Cal. June 20, 1988) (amended order).

98. *Id.* (amended order). The court held, in its opinion issuing the amended order, "[w]e agree with the Federal Defendants that Section 505(a)(2) does not provide the Court with jurisdiction to review the Corps' decision. . . . We also agree that [the APA and the federal-question statute, 28 U.S.C. § 1331] [do] provide us with jurisdiction." *Id.* at 1006 (noting that the court had originally held that it had subject-matter jurisdiction under the citizens' suit provision).

99. *Hanson*, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 20008 (E.D.N.C. Oct. 1, 1988).

> The federal defendants [EPA and the Corps], having had a duty to make a proper wetlands determination and to prohibit any unlawful dredge and fill activities in the event any of the lands described in the complaint were determined to be wetlands, had obviously failed to carry out a duty under this chapter.

Id. Federal agencies have nondiscretionary duties to follow their own regulations. *See* Beckovitz v. United States, 108 S. Ct. 1957, 1958-59 (1988) (Federal Tort Claims Act case in which Court notes that a duty is not discretionary if a course of action is prescribed for it by federal statute, regulation, or policy). This duty to follow its own regulations does not appear to be the duty which the Corps failed to perform in *Hanson*, for "[n]either the CWA nor the enabling regulations specify the precise methodology to be used by the Corps in [making wetlands determinations]." *Hanson*, 623 F. Supp. at 1545.

100. *Hanson*, 859 F.2d at 315 (emphasis added). The court held further that "[t]he Corps has a mandatory duty to ascertain the relevant facts, correctly construe the applicable statutes and regulations, and properly apply the law to the facts." *Id.* at 315-16.

101. Indeed, that is exactly what the *Hanson* trial court did. It evaluated the Corps' investigation to see if it yielded a "proper" wetlands determination. *Hanson*, 623 F. Supp. at 1545-48.

102. *See supra* notes 52-54 and accompanying text.

The *Hanson* trial court applied the standard of review found in the APA to the Corps' determination.[103] Use of this standard indicates the suitability of the APA for such review. The trial court had to import the APA standard since the CWA provides no standard for content review.[104] Congress intended, by the plain language of the provision, to permit citizens to force the agencies involved to perform their nondiscretionary tasks,[105] and presumably whether a duty has been performed can be determined without any need for a content-based review standard. The citizens' suit provision asks *if* a duty was executed, and the APA asks *how* it was executed. The absence of a review standard in the citizens' suit provision supports the distinction between the two questions, and makes the trial court's incorporation of the APA standard seem strained and unnecessary.

The *Hanson* court's task was basically to determine how the citizens' suit provision fits into the overall structure of judicial review of agency decisions. Like the original decision in *Golden Gate*,[106] it concluded that the provision contemplated content-based review of wetlands determinations.[107] The *Golden Gate* court, however, reversed itself with its later holding establishing jurisdiction under the APA and the federal question statute.[108]

The *Hanson* court's jurisdictional conclusion may profitably be analyzed in light of the previous EPA citizens' suits discussed and categorized earlier.[109] The categories, taken in summary, define the spectrum of agency misbehavior ranging from nonfeasance to malfeasance—from not performing a duty at all to not performing it correctly—with varying methods of review along the spectrum.

The first category involved nonfeasance—the EPA had failed to perform a nondiscretionary duty.[110] For such failure, the citizens' suit provision provided a remedy. The second involved discretionary nonfeasance—the EPA had failed to enforce the provisions of the CWA against specific polluters[111]—but the duty to enforce is discretionary. Since the duty is discretionary, the citizens' suit provision provides no remedy. The third category involved malfeasance—the EPA had performed a task, but allegedly had not performed it correctly.[112] The content-based review necessary in this situation, held the courts, was available only under the APA. Thus, in the eyes of the categorized courts, the CWA addresses only nonfeasance, leaving malfeasance to the APA.

Challenges of Corps' wetlands determinations closely resemble the content-

103. *Hanson*, 623 F. Supp. at 1544.

104. *See* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 904 (5th Cir. 1983) ("Since the Clean Water Act does not set forth the standards for reviewing the EPA's or the Corps' decisions, we look to the Administrative Procedure Act . . . for guidance."); *Hanson*, 623 F. Supp. at 1544 (applying APA standard); *Golden Gate*, 700 F. Supp. at 1553 (applying APA standard).

105. See *supra* note 6 for the text of the citizens' suit provision.

106. *Golden Gate*, 700 F. Supp. at 1553.

107. *Hanson*, 623 F. Supp. at 1540.

108. *Golden Gate*, 28 Env't. Rep. Cas. (BNA) at 1006. (opinion recognizing new order).

109. *See supra* notes 66-93 and accompanying text.

110. *See supra* notes 69-72 and accompanying text.

111. *See supra* notes 73-79 and accompanying text.

112. *See supra* notes 80-93 and accompanying text.

based EPA challenges for which the APA is the proper vehicle for judicial review. They, like the content cases, are questions of malfeasance, for the court decides not whether a determination was made at all, but whether a determination was made with adequate consideration of all factors.[113] In each of the EPA cases the courts concluded that content-based review is available through the APA, not the CWA.[114] Content-based challenges against the Corps should be treated in the same manner.[115]

The district court in *Hanson*, however, did not reach this conclusion.[116] That court apparently recognized the need for a nondiscretionary duty as a predicate for subject-matter jurisdiction under section 505 and held that the Corps had a mandatory duty "to make a proper wetlands determination."[117] This characterization of the Corps' duty was erroneous, because it transformed a discretionary function into a nondiscretionary duty. The effect was to allow section 505 rather than the APA provide content review. None of the other courts in content-based challenges interpreted the Act in this way;[118] instead, they recognized a distinction between review of whether a duty was performed at all and whether a duty was performed correctly[119] and concluded that the latter concern is properly within the province of the APA. Apparently *Hanson* could be broadly cited, in any nondiscretionary duty litigation, for the proposition that all nondiscretionary duties include content factors.

The APA by its terms provides review of an agency action to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[120] Each of these attributes reflects *how* an action was performed, precisely the question asked in the judicial evaluation of the quality of a wetlands determination. Under *Hanson*, however, content-based review of wetlands determinations is available in the Fourth Circuit under the citizens' suit provision, and plaintiffs need not resort to the APA. This special treatment

113. The *Golden Gate* court explicitly observed this distinction, agreeing with the federal defendants in its amended order that "the Corps of Engineers' . . . erroneous jurisdictional disclaimer may not be reviewed under the [citizens' suit provision] because the Corps' determination did not constitute a failure to perform a mandatory duty. Instead, . . . the determination was an abuse of discretion, reviewable under the Administrative Procedure Act." *Golden Gate*, 28 Env't. Rep. Cas. (BNA) at 1006.

114. *Las Vegas*, 755 F.2d at 704; *Scott*, 741 F.2d at 995 ("The only recognized avenue for challenge to the substance of EPA's action . . . is a suit under the Administrative Procedure Act."); Hough v. Marsh, 557 F. Supp. 74, 79 (D. Mass. 1982).

115. The first issue discussed in this analysis supports the notion of treating the Corps the same as the EPA. There it was noted that all of the courts that addressed the question held that the Corps should be treated the same as the EPA for purposes of amenability to suit under the citizens' suit provision. *See supra* notes 57-61 and accompanying text.

116. *Hanson*, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 20009 ("[T]his action comes within the terms of 33 U.S.C. § 1365(a)(2).").

117. *Id.* The court in *Golden Gate* originally reached this same conclusion, holding that "there can be no question that it is mandatory, and not discretionary, for the Corps' decision to be correct." *Golden Gate*, 700 F. Supp. at 1554. In the amended order, however, this conclusion became moot. *See supra* notes 94-99 and accompanying text.

118. *See supra* notes 82-93 and accompanying text.

119. *See supra* notes 82-93 and accompanying text.

120. 5 U.S.C. § 706(2)(A) (1982). See *supra* note 54 for text of § 706.

for citizens' suits seems inconsistent with the APA, which by its terms provides a mechanism for aggrieved citizens to seek review of the acts of federal agencies.

Whether subject-matter jurisdiction is provided by the citizens' suit provision or by the APA is important because of the differences in provisions for attorneys' fees. If the CWA provides jurisdiction, fees will be readily available to prevailing plaintiffs,[121] and environmentalists will have an incentive to bring actions under the Act. Otherwise, concerned citizens will have to provide their own funds or, at a minimum, may have to look elsewhere for fee awards. By allowing content-based review under the CWA, *Hanson* expands the government's fee-paying exposure under nondiscretionary duty citizens' suits provisions to include not only failures to perform duties, but also failures to perform them well.

Had *Hanson* been decided consistently with the EPA content cases, holding that the CWA did not provide subject-matter jurisdiction for content-based challenges, CWA attorneys' fees would not be available to citizens challenging wetlands determinations. Fees may be otherwise available, however, under the Equal Access to Justice Act (EAJA).[122] The EAJA provides for awards of costs and fees to prevailing plaintiffs in suits against the government unless the government's position is "substantially justified."[123] Since this standard for the recovery of fees is much more stringent than that of the CWA,[124] the CWA is much more attractive to citizens involved in this type of litigation.

If *Hanson* had been decided under the APA, CWA fees and costs would not have been available to the prevailing plaintiffs. Instead, the court would have determined whether the plaintiffs were entitled to an award under the EAJA. Thus, in addition to its finding that the Corps' determination was arbitrarily and capriciously made, the court would have to determine whether the government's position was "substantially justified." A fee award would be contingent on that finding. This extra requirement demonstrates the practical effect of basing judicial review of wetlands determinations challenges on the APA rather than on the citizens' suit provision of the CWA. This result is properly consistent with judicial review of the decisions of other agencies under the APA, however, for all APA plaintiffs must pass the substantial justification test to obtain fee awards.

Challenges to wetlands determinations are necessarily content-based, and the CWA citizens' suit provision does not address content. Consequently, these challenges are outside the scope of the provision. The citizens' suit provision contemplates suits to force the environmental agencies to perform nondiscretionary duties, but leaves judicial review of the quality of performance of those duties to the Administrative Procedure Act. Restated in context, a court may ask under this provision whether the Corps made a wetlands determination, but

121. See *supra* note 51 for the text of this provision.

122. 28 U.S.C. § 2412(d)(1)(A) (1982 & Supp. IV 1986). See *supra* note 55 for the full text of this section.

123. See *supra* note 56 and accompanying text for a discussion of "substantial justification."

124. 33 U.S.C. § 1365(d) (1982).

not whether it made it correctly. This result is supported both by the language of the provision and by comparison to citizens' challenges of analogous EPA determinations.

The *Hanson* court's decision, which reached the opposite conclusion—that Corps wetlands determinations are reviewable under the citizens' suit provision—cannot be harmonized with this reading of the provision. The court's conclusion that the Corps has a duty to make *proper* wetlands determinations usurps the APA, shifting content-based review from it to the CWA.

The practical effect of a rule requiring that challenges of wetlands determinations be made under the APA is that attorneys' fees made available under the CWA are not available in these challenges. Thus environmental groups and concerned citizens must look elsewhere for fee awards, perhaps to the Equal Access to Justice Act, or must finance their causes themselves. Unfortunately, the unavailability of CWA fee awards in these challenges may hamper the efforts of those seeking to protect wetlands.

Citizens should be required to base challenges to Corps' wetlands determinations on the Administrative Procedure Act rather than on the citizens' suit provision of the Clean Water Act. This rule would make recovery of attorneys' fees by concerned citizens more difficult, but would leave intact the proper relationship between the CWA citizens' suit provision and the APA—a relationship in which the CWA cures absolute failures to perform duties and the APA cures failures to perform them adequately. In any event, Congress created this relationship, and any decision to disturb it must be congressional rather than judicial.

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